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POSSIBLE FUTURE WORK

Note by the Secretariat

Addendum

Guidelines for pre-hearing conferences in arbitral proceedings

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INTRODUCTION

1. It was observed at the Congress on International Trade Law held by the Commission during its twenty-fifth session in 1992, as well as at other fora discussing international arbitration, that the principle of discretion and flexibility in the conduct of arbitral proceedings might in some circumstances make it difficult for participants to predict the manner of proceeding and to prepare for the various procedural actions. In connection with those observations, it has been stated that such difficulties could be avoided or reduced by holding at an early stage of arbitral proceedings a conference between the arbitrators and the parties in order to discuss and plan the proceedings. Furthermore, it was suggested that it would be useful to prepare guidelines for such "pre-hearing conferences". Possible work by the Commission on such guidelines is discussed in section I.

2. The Commission at its nineteenth session in 1986 considered a report entitled "Co-ordination of work: activities of international organizations on certain aspects of arbitration" (A/CN.9/280). 1/ The report covered activities of various international organizations with respect to the following topics of arbitration: multi-party arbitration, taking of evidence in arbitral proceedings, international court assistance in taking evidence in arbitral proceedings, the law applicable to arbitration agreements, adaptation or supplementation of contracts by third persons, and a code of ethics for arbitrators in international commercial arbitration. The purpose of the report was to provide information on the activities of other organizations and to invite consideration by the Commission of whether any of those issues warranted closer examination from the point of view of coordination of work and possible future work by the Commission itself. The Commission was of the view that multi-party arbitration and the taking of evidence in arbitration gave rise to issues that merited further consideration. 2/ These two topics are among those considered in section I, in the context of possible guidelines for pre-hearing conferences, since it is believed that a number of issues arising from these two topics can appropriately be addressed by such guidelines. Further considerations of the two topics are contained in sections II and III. Conclusions are set forth at the end of the paper.

I. PRE-HEARING CONFERENCE

A. Introductory remarks

3. Arbitration rules governing arbitral proceedings, in particular the stage of proceedings when hearings are held and various documents exchanged, typically allow a fair degree of discretion and flexibility in the conduct of arbitral proceedings.

1/ Reproduced in United Nations Commission on International Trade Law Yearbook, volume XVII: 1986, part two, IV.

2/ Report of the United Nations Commission on International Trade Law on the work of its nineteenth session (1986), Official Records of the General Assembly, Forty-first Session, Supplement No. 17, A/41/17 (ibid., part one, A), paras. 254-258.

4. An example for the flexibility and discretion in the conduct of proceedings is article 15(1) of the UNCITRAL Arbitration Rules, which provides:

> "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

5. The principle of flexibility and discretion has two kinds of limits. First, the discretion of the arbitral tribunal does not extend to questions that are settled in the applicable rules; in the case of the UNCITRAL Rules, this is indicated in article 15(1) in the introductory phrase "Subject to these Rules". 3/ Second, the arbitral tribunal must observe mandatory procedural provisions of the law applicable to the arbitration. 4/ Such mandatory provisions, however, often do not increase the level of certainty and predictability of arbitral proceedings. One mandatory principle, which is in various formulations present in all procedural systems, is expressed in article 18 of the UNCITRAL Model Law on International Commercial Arbitration: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

6. The principle of discretion and flexibility is useful and generally considered as the best approach inasmuch as it can accommodate different procedural styles and thus allow arbitral proceedings to be adapted to the case at hand and to be conducted in the procedural style to which the parties and the arbitrators are accustomed.

7. The need for flexibility and discretion diminishes in so far as the participants in the arbitration are in a position to plan the proceedings and prepare their procedural actions. If such planning does not take place, it is possible, in particular in an international arbitration, that a party or a member of the arbitral tribunal will find the proceedings surprising, unpredictable and difficult to prepare for. This may lead to misunderstandings, delays and increased costs of proceedings. Factors such as differences in procedural traditions are mentioned as reasons for such difficulties. It may be added that, since arbitrations do not have to follow, and usually do not follow, procedural patterns usual in a court, and since many arbitrators have developed individual variations of a procedural

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3/ The UNCITRAL Arbitration Rules provide several exceptions to the general principle of flexibility in the conduct of proceedings; they concern, for example, delivery of notifications, communications or proposals (art. 2(1)); obligation to hold oral hearings if either party so requests (art. 15(2)); notice of oral hearings (art. 25(1)); requirement to identify in advance any witnesses to be heard (art. 25(2)); and various aspects of taking evidence by experts (art. 27). In addition, the Rules contain specific provisions on the steps to be taken in order to establish the arbitral tribunal and commence the proceedings, as well specific provisions relating to the arbitral award.

4/ This requirement is expressed in article 1(2) of the UNCITRAL Rules; it is also expressed in statutory provisions on setting aside of arbitral awards and on recognition and enforcement of arbitral awards.

style, those difficulties may arise also in arbitrations in which the participants' legal backgrounds are not dissimilar.

8. As a measure to avoid such difficulties, there exists a practice of holding, shortly after the constitution of the arbitral tribunal, a meeting between the arbitral tribunal and the parties with a view to clarifying and planning the conduct of subsequent proceedings. Appropriate procedural agreements are concluded or decisions taken at such meetings in order to make subsequent hearings more effective and predictable. Meetings of this kind are referred to in practice by terms such as "pre-hearing conference", "preliminary hearing", "pre-trial review", or "administrative conference". The present paper uses the term "pre-hearing conference".

9. Few sets of international arbitration rules make specific reference to pre-hearing conferences. Among the rules that do so are the Rules of Procedure for Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID) (1984) (art. 21(1)). Among the rules that do not refer to a pre-hearing conference are, for example: the UNCITRAL Arbitration Rules, Rules of the London Court of International Arbitration, and the International Arbitration Rules of the American Arbitration Association. The procedure for drawing up the "Terms of Reference" at the beginning of an arbitration, as specified in article 13 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce, is in some of its elements similar to a pre-hearing conference; nevertheless, while the terms of reference are rather specific about the claims and points at issue, they typically do not address the procedural details usually dealt with in a pre-hearing conference.

10. Pre-hearing conferences are in practice convened irrespective of whether the agreed set of arbitration rules deals with such a conference. This indicates that arbitral tribunals consider the decision to convene such a conference to be within the general procedural authority of the arbitral tribunal to conduct arbitral proceedings in the manner it considers appropriate (see above, para. 4).

11. The confidential nature of arbitration makes it difficult to measure the extent of the practice of holding pre-hearing conferences. Judging by reports of practitioners, it seems that in a good number of international arbitrations such conferences are held. It appears that pre-hearing conferences are particularly likely to be convened in cases where the arbitrators see the role of the arbitral tribunal more as one of a moderator of the proceedings as opposed to an active investigator, and where, in accordance with this procedural tendency, the parties are expected to assume a fair degree of procedural initiative.

12. It might be concluded that, since there appear to be no reports objecting in principle to the practice of holding pre-hearing conferences, and since many commentators praise the usefulness of the practice, it may be

expected that pre-hearing conferences are likely to become more frequent also where they have not been customary. 5/

B. Proposal for preparation of guidelines for pre-hearing conferences

13. It is suggested that holding a pre-hearing conference constitutes a useful practice in that it facilitates the preparation of the parties for the proceedings, helps avoid misunderstandings and expedites arbitrations. Pre-hearing conferences are particularly useful in international arbitrations, in which the expectations of parties or arbitrators as to the manner of proceeding may differ. Furthermore, the focused and early discussion of procedures at a pre-hearing conference fosters adopting procedural decisions by consensus, as opposed to the presiding arbitrator making procedural orders or the parties imposing procedures on the arbitral tribunal by their agreement.

14. For a pre-hearing conference to be effective, it is highly advisable for the arbitrators to prepare an agenda with topics for discussion and to give the parties advance notice of those topics. Arbitrators who have had limited experience with pre-hearing conferences may find it time consuming to prepare one. Similarly, an insufficiently experienced party may find it difficult to participate effectively in such a conference.

5/ The VIIIth International Arbitration Congress, in the context of the consideration of a hypothetical international commercial case, heard replies to the question whether in that kind of case it was customary to hold a pre-hearing conference. According to the replies, in some parts of the world, such as the United States, England and Nigeria, it is customary to hold such conferences; for arbitrations under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC), it was said that meetings for the preparation of "terms of reference", which are regularly held, often serve as a pre-hearing conference (see, however, para. 9). For some other parts of the world, such as Arab countries, Eastern Europe or Japan it was indicated that such conferences were unusual or not customary; some replies portraying the situation in those other parts of the world indicated that there are no formal obstacles to holding such conferences and that some pre-hearing conferences have been held. See International Council for Commercial Arbitration, Congress series no. 3, Comparative arbitration practice and public policy in arbitration, General Editor Pieter Sanders, 1987, Kluwer, Deventer, the Netherlands, pp. 63-66.

15. There exist some guidelines for the preparation and conduct of pre-hearing conferences. 6/ However, those guidelines, usually rather short and in the form of a checklist of topics to be discussed, were prepared for the work of a particular arbitral institution under a particular set of arbitration rules or were designed for domestic cases.

16. In order to facilitate the preparation and carrying out of pre-hearing conferences, it is suggested that it would be useful for the Commission to prepare guidelines for pre-hearing conferences, taking into account various legal traditions and the needs of international commercial arbitration. This work would contribute to the dissemination of practical knowledge about arbitration, and would facilitate participation in arbitrations of persons who have little contact with arbitral practice in traditional arbitration centres.

17. The purpose of the guidelines would be to increase certainty and predictability in arbitral proceedings, while maintaining flexibility in the conduct of proceedings. The guidelines would do so by drawing the attention of the parties and the arbitrators to questions that could usefully be considered at a pre-hearing conference. Those questions could concern technical details in the implementation of the rules governing the proceedings as well as questions not dealt with by those rules.

18. The assumption would be that the parties involved in the pre-hearing conference have agreed on a set of arbitration rules or, if they have not, that they may wish to do so at the pre-hearing conference. The decision to use the guidelines would not in itself mean any modification of the agreed arbitration rules. It might be appropriate, however, for the parties to agree at the pre-hearing conference on procedural solutions that would complement the agreed set of arbitration rules. It may also be that the parties would wish to modify the agreed rules in light of the discussions at the pre-hearing conference. In order to facilitate such agreements, it may be appropriate for the guidelines to contain, with respect to selected procedural issues, illustrative clauses, possibly in alternatives.

19. While the participants would normally make their decisions at the pre-hearing conference, it might be useful in some cases for the tribunal to meet after the conference and draft a document setting out decisions resulting from the conference.

20. The guidelines should draw attention to the obligation to observe mandatory procedural law.

21. Generally speaking, the purpose of pre-hearing conferences is to consider questions of arbitral procedure. Nevertheless, in this context it would not be useful to make a clear distinction between procedure and substance, since it is frequently beneficial at pre-hearing conferences to touch upon issues that may not be strictly procedural (e.g., precise definition of the relief sought, stipulations of undisputed facts, and exchange of information concerning points at issue).

6/ For example, the Iran - United States Claims Tribunal has adopted the Internal Guidelines of the Tribunal (undated), reproduced in Iran - United States Claims Tribunal Reports, vol. I, 1983, p. 98. Another example are the Guidelines for Expediting Large, Complex Commercial Arbitrations (1990) of the American Arbitration Association.

22. The timing of pre-hearing conferences should be flexible. While a pre-hearing conference is typically held shortly after the arbitral tribunal has been appointed, the development of the case may make it useful for the participants to meet at more than one pre-hearing conference.

23. While work by the Commission on the proposed subject might be regarded as a useful complement to the UNCITRAL Arbitration Rules and, more generally, as an appropriate continuation of the Commission's work in the area of arbitration and conciliation, it appears that any guidelines elaborated by the Commission would not necessarily have to be tied to arbitrations governed by the UNCITRAL Arbitration Rules.

C. Possible topics for consideration at pre-hearing conference

24. The purpose of the following tentative outline of topics that may be discussed at a pre-hearing conference is to facilitate consideration by the Commission of whether to prepare the guidelines and to elicit observations to be used in the preparation of draft materials by the Secretariat, were the Commission to decide to proceed with the project. 7/

25. It is suggested that, while the guidelines should contain a fairly complete list of questions to be considered, it should be made clear in the guidelines that not all the questions should necessarily be put on the agenda of a pre-hearing conference. Furthermore, the list of questions in the guidelines should not be regarded as exhaustive.

(a) Rules governing arbitration

26. If in case of an ad hoc arbitration the parties have not agreed on a set of arbitration rules, it is advisable that they do so at the pre-hearing conference.

(b) Administrative support

27. The participants may wish to consider whether they wish an institution to provide administrative support to the arbitration. If so, it is useful to consider the types of administrative services needed, the types of services available and the costs involved.

(c) Appointment of secretary of the tribunal

28. The participants may wish to consider whether, in view of the size and complexity of the case, it is warranted for the arbitral tribunal to appoint a person who is to carry out administrative tasks under the direction of the tribunal (secretary, registrar or administrator). If such a person is to be appointed, it is recommendable to discuss the types of administrative tasks that person will carry out. (The guidelines might include examples of such administrative tasks.)

7/ In drafting a number of items in this outline use was made of the article by Howard M. Holtzmann "Balancing the Need for Certainty and Flexibility in International Arbitration Procedures", written for the Twelfth Sokol Colloquium on International Law "International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?", University of Virginia School of Law, March 27-28, 1992.

(d) Possibility of settlement

29. The guidelines, in discussing whether settlement of the dispute should be a topic at a pre-hearing conference, should recognize that in principle the parties should not be hindered in attempting to settle the dispute. Nevertheless, it may be said that, in particular when settlement does not appear easily attainable, it is advisable, in order to preserve the effectiveness of the pre-hearing conference, to limit the discussions at the conference to the following: (i) the status of any settlement discussions (limited to whether any discussions took place or are likely to take place); (ii) consideration as to whether the possibility of settlement discussions should affect the scheduling of the arbitral proceedings; and (iii) whether the parties would be willing to consider conciliation or other forms of alternative dispute resolution procedures and, if so, whether they wish to proceed on the basis of a set of rules such as the UNCITRAL Conciliation Rules.

(e) Points at issue, relief or remedy sought, order of deciding issues

30. If points at issue or the relief or remedy sought have not been clearly defined in the submitted statements, it is advisable to clarify them, without, however, hearing arguments in support of claims. Consideration might be given to identifying issues that could be decided as preliminary questions. It might also be considered whether any issue (e.g., whether the defendant is liable) should be decided in a partial award earlier than other issues (e.g., the amount of damages).

(f) Uncontested statements of fact

31. In order to simplify the taking of evidence, it is advisable for the parties to stipulate that certain statements of fact are to be regarded as uncontested. If the parties are willing to do so, a time period may be set within which they should submit the stipulations in writing to the arbitral tribunal.

(g) Place of arbitration

32. If the place of arbitration has not been determined, the participants may wish to determine the town or country and the locale where the arbitration is to be held.

33. The participants may wish to discuss whether any reason exists for conducting part of the proceedings outside the locale or place of the arbitration. For example, circumstances may make it appropriate to hear witnesses, to hold meetings of the arbitral tribunal for consultation among its members, or to inspect goods, other property or documents at a place other than the locale, town or country of the arbitration.

(h) Hearings

34. It is advisable to consider the following:

(i) the expected length of hearings;
(ii) whether the hearings will be held on consecutive days or will be separated;
(iii) time schedule for hearings;
(iv) the order in which the parties will make their oral presentations;
(v) whether opening statements or closing statements will be heard;

(vi) whether rebuttal and rejoinder statements will be permitted; if so, whether certain limitations should be observed (e.g., whether a rebuttal or rejoinder by a party should be limited to matters covered in the other party's previous statement);

(vii) any right of the arbitral tribunal to impose time limits on oral arguments or testimonies;

(viii) whether the parties should submit a written summary of the arguments made orally; if so, whether summaries should be submitted at the hearing or could be submitted shortly thereafter;

(ix) the manner of taking oral evidence by witnesses (on this matter it might be decided to include in the guidelines illustrative clauses on which the parties could agree or on which the arbitral tribunal can model its procedural decision); 8/

(x) whether witnesses will be required to make an oath or affirmation and, if so, its form, taking into account any laws of the place of arbitration governing the administration of oaths;

(xi) whether interpretation will be needed and, if so, the arrangements therefor and how costs will be borne;

(xii) whether a stenographic transcript or a tape recording of the hearings will be made and, if so, the arrangements for those services and how costs will be borne.

(i) Language of proceedings

35. Unless the language or languages to be used in the proceedings has already been determined, the participants should make that determination in accordance with the applicable rules.

36. It may be discussed whether documents or exhibits annexed to the statement of claim, and documents and exhibits to be submitted later, that are not in the language of the proceedings may be submitted in their original language or should be accompanied by a translation. (The guidelines might contain further considerations regarding costs or a possible decision that identified documents or exhibits or types of documents or exhibits may be submitted in the original language.)

(j) Written statements

37. The following questions may be considered:

(i) which written statements, in addition to the statements of claim and defence, should a party submit;

(ii) which written statements is a party entitled to submit (e.g., a claimant's replication to the statement of defence and the defendant's rejoinder);

(iii) whether post-hearing written statements will be permitted;

8/ Different solutions may be offered: one may be to provide that witnesses will be questioned first by the arbitral tribunal, and then may be questioned by the party who called the witness, cross-examined by the other party and re-examined by the party who called the witness; it may also be provided that the procedure is subject to control by the arbitral tribunal, including the right to deny a party to question a witness. Another solution may be for a witness to be examined and cross-examined by the parties under control of the presiding arbitrator, while the arbitral tribunal retains the right to pose questions during or after the parties' questioning.

(iv) whether all statements should be made consecutively or whether the arbitral tribunal expects them to be submitted simultaneously;

(v) the structure of written statements; 9/

(vi) a time schedule for submitting written statements;

(vii) the manner of transmitting the written statements (e.g., they may be exchanged directly between the parties, with copies to the arbitral tribunal, or they may be filed with an administrator and transmitted by the administrator to the arbitrators and the other party).

(k) Documentary evidence

38. It is advisable to determine a time schedule for submitting documentary evidence.

39. The parties may be encouraged to agree to submit jointly one set of documents whose authenticity is not disputed ("the agreed bundle"). It should be made clear to the parties that the purpose of this procedure is to avoid duplicate submissions and discussions concerning the authenticity of documents, and that the procedure does not prejudice the position of the parties concerning the significance of the content of the documents.

40. It may be useful to agree that, unless a document is contested within a specified time period, (i) the document is accepted as having originated from the indicated source, (ii) a copy of a communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee and (iii) a photocopy is accepted as correct. It may be clarified that, at least as regards the presumption under (iii), a document may be contested later if the arbitral tribunal considers the delay justified.

41. It may be considered whether voluminous or complicated documentary evidence should be presented by reports of independent persons (e.g., public accountants or consulting engineers) or through summaries, tabulations, charts, extracts or samples. This approach should be combined with arrangements that give the other party the opportunity to review the underlying data and the methodology of preparing documents based on that data. A time schedule may be advisable.

42. The arbitral tribunal may enquire whether a party intends to seek, or to request the arbitral tribunal to seek, production of documentary evidence from the other party. If so, conditions such as the following may be laid down: the document must be described with reasonable precision; the arbitral tribunal must have recognized the documentary evidence as relevant, admissible and material; the document must be within the control of the party from whom production is sought; and the seeking party must have made reasonable but unsuccessful efforts to obtain the document. The parties should be reminded that the arbitral tribunal would be free to draw its conclusions from the failure of a party to produce a properly requested document. In addition, it may be useful to establish a time-frame for submission of a request for documents, for production of documents or other response to the request.

9/ An example of such a structure is provided in article 31(3) of the Rules of Procedure for Arbitration of the International Centre for the Settlement of Investment Disputes (ICSID).

(l) Physical evidence

43. It may be useful to enquire whether a party intends to submit physical evidence other than documents and to determine arrangements for such submission (e.g., time schedules, the opportunity for the other party to inspect the evidence in advance of the hearing, and measures to safeguard the evidence).

44. If a party or the arbitral tribunal intends to request an on-site inspection of goods, other property or documents, it may be useful to consider arrangements and time schedules.

(m) Practical requirements concerning written statements and exhibits

45. When extensive submissions are likely, it might be useful to determine a number of practical details such as:

(i) number of copies in which each writing is to be submitted;
(ii) size of paper;
(iii) uniform system for numbering of exhibits;
(iv) method for identifying exhibits, including tabs;
(v) requirement that when a party refers to a submitted document, the document must be identified by its heading and document number assigned to it;
(vi) requirement that paragraphs in documents prepared for the proceedings be numbered;
(vii) whether translations will be included in the same volume as the original text or will be submitted in a separate volume.

(n) Evidence of witnesses

46. If witnesses are to be heard, and it has been agreed that the party presenting the evidence must submit in advance of the hearing a written communication relating to the testimony of the witness, it is advisable to consider the elements of such a communication. It might also be appropriate to prepare an illustrative clause. (In preparing the guidelines on this point, account should be taken of existing texts, such as for example, art. 25(2) of the UNCITRAL Arbitration Rules and art. 5 of the IBA Rules of Evidence. 10/) (As to the manner of taking oral evidence of witnesses, see above, para. 34, item (ix)).

47. It may be useful to consider arrangements for submitting evidence of witnesses in the form of written and signed statements, including the question whether such statements should be sworn to and, if so, what formalities would be required.

10/ The Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration ("IBA Rules of Evidence") were adopted in 1983 by the Council of the International Bar Association; the Rules are published in a brochure of the International Bar Association; also published in Yearbook Commercial Arbitration, Kluwer, Deventer, vol. X-1985, pp. 152-156, and in Arbitration International, vol. 1, no. 2 (July 1985), pp. 119-124.

48. It may be considered whether certain persons affiliated with a party should be presumed interested in the outcome of the case and therefore excluded from testifying (e.g., executives, employees of certain status or regardless of status, shareholders or pensioners of a company). If certain persons are excluded from testifying, it may be considered how will the arbitral tribunal receive information from them.

49. It is advisable to clarify whether it is proper for a party or a legal adviser to interview witnesses or potential witnesses prior to their appearance at a hearing.

(o) Expert evidence

50. The decisions to be made at the pre-hearing conference would depend on whether the agreed upon arbitration rules foresee that experts are to be appointed by the arbitral tribunal or whether it is up to the parties to present expert testimony.

51. In the first case, the participants may discuss, for example, (i) whether one or more experts will be appointed; (ii) whether the arbitral tribunal should invite comments of the parties on the choice of the expert or the expert's terms of reference; (iii) arrangements regarding the costs for the expert; (iv) procedures to permit the parties to express in writing the opinion on the expert's report, to interrogate the expert at a hearing and to present an expert witness to testify on the points reported on by the expert appointed by the arbitral tribunal.

52. If the arbitral tribunal itself does not appoint experts, and it is entirely up to the parties to present evidence of expert witnesses, the guidelines on the point may be an adaptation of foregoing paragraphs 46-49 which relate to evidence of witnesses.

(p) Procedural arrangements for multi-party arbitration

53. When the arbitration involves more than two parties and possibly also more than two disputes ("multi-party arbitration"), it is advisable to discuss the anticipated course of proceedings in order to avoid unnecessary delays and costs and to ensure the respect of each party's procedural rights.

54. It is possible that the disputes joined into one multi-party arbitration are covered by arbitration agreements that have not been harmonized (e.g., they refer to different sets of arbitration rules). The pre-hearing conference offers an opportunity to eliminate any such conflict by agreement of the parties.

55. It is advisable to identify the main points at issue in the various disputes involved, with a view to ascertaining whether it would be useful to divide the multi-party proceedings into stages. The first stage may be devoted to any objections concerning the jurisdiction of the arbitral tribunal. The following stages may concentrate in appropriate order on reaching decisions that in some way constitute preliminary decisions in another dispute (e.g., facts to be established in one dispute may be relevant in another dispute, or liability found to exist in one dispute may affect the decision in another dispute).

56. Since the decision in one dispute may affect the position of a party in another dispute, it is important to give each interested party an opportunity to present its arguments on the issues that affect that party. If some issues do not affect all the parties involved, it may be possible, in order to save costs, to plan the hearings in such a way that a party would have to be present only at hearings of concern to that party.

57. It is advisable to consider at the pre-hearing conference procedural questions such as the scheduling of meetings, flow of communications among the parties and the arbitral tribunal, the manner in which the parties will participate in hearing witnesses, the appointment of experts and the participation of the parties in the taking of evidence by experts, the order in which the parties will make statements, and the apportionment of the deposits for costs.

II. MULTI-PARTY ARBITRATION

1. Introductory remarks

58. As noted above in paragraph 2, the Commission, at its nineteenth session in 1986, considered that multi-party arbitration required further study.

59. There are many situations that may give rise to a dispute involving more than two parties and possibly also more than two disputes. The following situations are some of the many examples of the notion of multi-party arbitration:

- a case in which a single arbitration is to decide more than one dispute between different pairs of parties. For example, in a construction contract, one arbitration may be established to decide two disputes arising from the same construction defect, one between the purchaser and the contractor and another one between the purchaser and the architect; in another example, the sale of goods by A to B and the resale of those goods to C may give rise to a single arbitration to decide the dispute between A and B and the dispute between B and C, both disputes arising from the same defect in the goods;

- arbitration in which the dispute is between parties A and B, but where a third party C, who has an interest in the outcome of the dispute, is allowed to join the proceedings in order to submit evidence and make statements. Such a situation may arise, for example, in an arbitration between purchaser A and seller B because of defects in the goods, in which case the responsibility of party C (who sold the goods to party B) may depend on whether the arbitral tribunal finds the goods to be defective. Such cases are sometimes referred to as "joinder", "impleader" or "intervention".

- a multilateral contract (e.g. a joint venture or consortium) may give rise to a dispute in which on each side one or more parties to the contract are involved.

60. A possible benefit of establishing a multi-party arbitration, as opposed to considering disputes in separate arbitrations, is that multi-party arbitration avoids inconsistent decisions, a possibility which, while not frequent, exists when related disputes are treated in separate arbitrations.

For example, if the purchaser of a construction works sues for the same defect the contractor and the designer in separate proceedings, the independent and uncoordinated evaluations of the facts may result in the purchaser being unsuccessful in both cases. Another potential benefit is that considering the related issues in one proceedings may save time and costs. Such savings can be achieved, for example, when pieces of evidence or arguments relevant in more than one dispute are considered once for all the disputes.

61. In spite of such possible benefits, it is often difficult to agree on and establish a multi-party arbitration, and complications may arise in carrying out such an arbitration.

62. At the time of setting up a network of contracts affecting more than two parties or a multilateral contract, when dispute settlement clauses are typically formulated, it is usually impossible to know which parties, and with what interests, will be implicated in a dispute. This makes parties reluctant to agree on a multi-party arbitration clause.

63. After the dispute in a multi-party situation has arisen it may be difficult to obtain agreement of all the parties to establish a multi-party arbitration. One reason may be a party's reluctance to allow a person who is not a party to the contract in dispute to obtain access to facts concerning the contract (e.g., a seller of goods may not wish the producer of the goods to be involved in a dispute with the ultimate buyer of those goods, or the main contractor may prefer not to involve a subcontractor in the dispute with the purchaser of industrial works).

64. Another difficulty, assuming that the parties have agreed in principle to hold a multi-party arbitration, may be that arbitration agreements covering the different disputes involved foresee different methods of appointing the arbitrators. Furthermore, even if those methods do not differ or have been harmonized, the interests of the parties may differ to the extent that each party wishes to appoint an arbitrator. Those circumstances may hinder the usual appointment of a single-member or three-member arbitral tribunal.

65. A small number of jurisdictions have attempted to overcome the difficulties in setting up a multi-party arbitration by allowing a party who considers that two or more cases should be dealt with in one proceedings to obtain a court order consolidating the cases into a single multi-party arbitration. Legislation to this effect has been adopted in the Netherlands, Hong Kong, and in the state of California, while in some other jurisdictions of the United States of America such a power of courts has been recognized in case law. In some jurisdictions (e.g., in Australia and Canada) laws have been adopted empowering courts to order consolidation on terms established by the court, but only if all the parties have agreed to consolidation. It may be noted, however, that considerations in some countries as to whether to adopt such legislation have led to the decision not to do so because potential complications involved in court-ordered consolidations were thought to outweigh its potential benefits. A recommendation against allowing court-ordered consolidations was taken, for example, in 1990 in England by a law reform advisory committee.

66. Furthermore, assuming that the arbitral tribunal has been established, multi-party proceedings covering several disputes can be more complicated to manage than bilateral proceedings. Complications may arise, for example, in planning the sequence of issues to be considered, in taking evidence and

hearing arguments in such a way that each interested party has an opportunity of presenting its case, in scheduling meetings, and in managing the flow of documentation. Delays and costs resulting from such complications may reduce, or even exceed, the savings the parties might have hoped to achieve by organizing a multi-party arbitration.

2. Possible future work by the Commission

67. It appears that, in view of the great variety of possible multi-party situations and in view of the reluctance of parties to agree to multi-party arbitration, it may not be promising to undertake a project concentrating on the elaboration of a model multi-party arbitration clause. For situations when the parties have in principle agreed that a multi-party arbitration be held but have difficulties in establishing the arbitral tribunal, a partial solution may be an agreement entrusting the appointment of all the arbitrators to an appointing authority. A more flexible and comprehensive approach might be to prepare a guide explaining features, advantages and disadvantages of multi-party arbitration.

68. As to difficulties mentioned above in paragraph 66, which arise after the establishment of the arbitral tribunal, it appears that a pre-hearing conference presents a suitable opportunity to address them (see above, paras. 53-57).

69. The other issues (mentioned above in paras. 62-64), which arise before the establishment of the arbitral tribunal, cannot be discussed at a pre-hearing conference, because such a conference presupposes the existence of the arbitral tribunal. The Commission may wish to consider that the decision as to any future work on those issues (e.g., on a guide or on statutory provisions on court-ordered consolidation) should be made at a later stage. That decision would be easier to make in light of views to be formed during possible future work on guidelines for pre-hearing conferences and in light of the progress of work on multi-party arbitration in the International Chamber of Commerce (ICC).

70. An ICC Working Party (established by the ICC Commission on International Arbitration) has been working for a number of years on multi-party arbitration. As reported by the Working Party, one of its objectives has been to expand on the Guide on Multi-party Arbitration under the Rules of the ICC Court of Arbitration, which was adopted by the ICC in 1981 (ICC doc. no. 420/297, 28 April 1987; the ICC Guide was published in the ICC Brochure no. 404, 1982). In 1986 the Working Party submitted to the ICC Commission on International Arbitration draft guidelines on ICC multi-party arbitration and a draft multi-party arbitration clause (ICC doc. no. 420/276, 30 January 1986, annex I and II). The guidelines and the clause have not been adopted in view of controversial reactions from ICC National Committees (ICC doc. no. 420/282, 1 July 1986). The ICC Working Party is continuing work on the project.

III. TAKING OF EVIDENCE

1. Introductory remarks

71. As mentioned above in paragraph 2, the Commission considered at its nineteenth session that the taking of evidence was another area that should be further studied.

72. The practice of taking evidence in arbitration follows different patterns. Some arbitrators and parties are inspired by the "adversarial" system, under which it is essentially up to the parties to gather evidence and present it to the arbitrators, who do not take an active role in the evidentiary process. One of the cornerstones of the adversarial system is that the basic evidence is presented in the form of verbal testimony and that the party disputing the fact is able to test such testimony by cross-examining the witness. Other arbitrators and parties are influenced by the "inquisitorial" system, which, while maintaining the principle that the parties are to prove facts supporting their case, leaves room for the arbitral tribunal to take initiative in the taking of evidence. It appears, however, that in international arbitral practice sharp lines between the two procedural systems are disappearing and that participants in international arbitrations prefer to follow hybrid patterns.

73. Contractual arbitration rules largely do not regulate the details of the method of taking evidence. This is true also of the UNCITRAL Arbitration Rules, although these Rules address more questions of the evidentiary procedure than many other international rules. As a result, many questions of evidentiary procedure are in practice left to the discretion of the arbitral tribunal.

74. As noted above in paragraph 7, the principle of discretion and flexibility in the conduct of arbitral proceedings, while acceptable as a general approach, may give rise to difficulties when parties and arbitrators in a given arbitration have different expectations as to the method of taking evidence.

2. Possible future work

(a) Set of rules

75. One way for addressing those difficulties may be a set of contractual rules of evidence that the parties may agree upon. A disadvantage of a single set of rules, however, is that, to the extent it increases certainty and predictability in the proceedings, it reduces flexibility with which the evidentiary process can be adapted to legal traditions and expectations of the participants in an arbitration.

76. The IBA Rules of Evidence (see above, footnote 10) constitute such a set of rules prepared at the international level. The content of the IBA Rules is summarized in document A/CN.9/280 (above, footnote 1, paras. 30-38). As noted in the introduction to the Rules,

> "They are solely concerned with the presentation and reception of evidence in arbitrations and are recommended by the International Bar Association for incorporation in, or adoption together with, institutional or other general rules or procedures governing international commercial arbitrations."

77. The procedures provided by the IBA Rules are, on the one hand, fairly detailed, but, on the other hand, allow the arbitral tribunal a good degree

of discretion to act otherwise than prescribed in the Rules. 11/ As a result, the IBA Rules, read as a whole, while providing welcome guidance, do not provide more certainty than, for example, the UNCITRAL Arbitration Rules.

78. In view of the confidentiality of arbitration, it is difficult to estimate the extent to which the IBA Rules are used. On the basis of published awards and information obtained from practitioners, it appears that the cases in which the IBA Rules are formally agreed upon are not many. It may be, however, that more numerous are the cases in which the Rules, while not formally agreed upon, have served as a guide on taking evidence.

(b) Guide on taking evidence

79. Another way to address difficulties in taking evidence may be a guide that would discuss possible methods of taking evidence and perhaps also include various models of rules that parties could agree upon. 12/ Such a guide could contribute to the development of efficient arbitral practices by educating parties and arbitrators.

80. While recognizing the important benefits of such a guide, it may be noted that the guide would probably not decisively increase certainty and predictability of proceedings in a given arbitration. To achieve certainty and predictability, it is necessary to settle details of evidentiary procedure before the beginning, or at an early stage, of the arbitration.

81. It appears that parties are reluctant to settle details of arbitral procedure before the dispute has arisen. This reluctance may be due to a tendency of parties not to spend too much time on the arbitration agreement and rules of arbitration before a dispute has arisen. Another reason may be that in determining the details of evidentiary procedure it may be advisable to bear in mind the background of the arbitrators, which may make it inadvisable to settle those details only after the arbitrators have been appointed.

(c) Guidelines for pre-hearing conferences

82. In view of the considerations mentioned in the preceding paragraph, it appears that an appropriate moment for fixing details of evidentiary

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11/ For example, notwithstanding detailed rules on taking of evidence by witnesses, it is provided that the arbitral tribunal "shall have at all times complete control over the procedure in relation to a witness giving oral evidence" (art. 5(10)) and that "Nothing herein shall preclude the Arbitrator in his discretion from permitting any witness to give oral or written evidence" (art. 5(14)). Another such provision entitles the arbitrator "to exercise all the powers he deems necessary to make the arbitration effective and its conduct efficient as regards the taking of evidence" (art. 7(h)).

12/ The idea of guidelines for presenting evidence in arbitration was considered at the Vth International Arbitration Congress (New Delhi, 1975) (reports and discussions are published in Proceedings of the Fifth International Arbitration Congress, New Delhi, New Indian Council of Arbitration, 1975). See document A/CN.9/280, paras. 27 and 28.

procedure is a pre-hearing conference, which is typically held at an early stage of the arbitral proceedings. Guidelines for pre-hearing conferences, as outlined above in paragraphs 13-57, might suggest procedural solutions and, where appropriate, illustrative clauses that could be used in deciding on a particular procedure.

CONCLUSIONS

83. As discussed above in paragraphs 13-16, it is suggested that the Commission decide to prepare guidelines for pre-hearing conferences. In the context of that work, it is suggested to address also procedural arrangements for multi-party arbitration (see above, paras. 53-57) and for the taking of evidence (see above, paras. 38-52). If the Commission agrees with the suggestion, it may wish to request the Secretariat to prepare a draft text of guidelines. The draft might be submitted to the Working Group on International Contract Practices once it has completed its work on guarantees and stand-by letters of credit. Otherwise, the Commission itself might wish to consider the draft at its twenty-seventh session in 1994 or twenty-eighth session in 1995.

84. As to the question whether the Commission should undertake additional efforts in the area of multi-party arbitration, perhaps by preparing a guide, the Commission may wish to defer the decision. The taking of that decision may be easier in light of views to be formed during the work on guidelines for pre-hearing conferences and in light of the progress of work on multi-party arbitration in the International Chamber of Commerce (see above, paras. 69-70).

85. As to possible work on the taking of evidence in arbitration, perhaps in the form of a guide, the Commission may wish to consider that the need for such work, as well as its scope, would be clearer after agreement has been reached on the scope and substance of guidelines for pre-hearing conferences (see above, paras. 79-82).